UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Charging Party, **Case Nos.** **21-CA-150873**
21-CA-164483
and **21-CA-175414**
21-CA-192602

XPO CARTAGE, INC.

Respondent.

BRIEF IN SUPPORT OF RESPONDENT XPO CARTAGE INC.'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE CHRISTINE E. DIBBLE'S DECISION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

Pursuant to Section 102.46 of the National Labor Relation Board's ("Board") Rules and Regulations, Respondent XPO Cartage, Inc. ("XPO") respectfully submits this Brief in Support of its Exceptions to the September 12, 2018 Decision of Administrative Law Judge ("ALJ") Christine E. Dibble ("ALJD").

I. INTRODUCTION

The fundamental threshold issue in this case is whether the charging parties are independent contractors or employees. On this issue, the underlying assumption of ALJ Dibble's decision is that the existence of an economic interdependence between two parties who choose to enter into a commercial relationship creates a master and servant relationship. The ALJ does not articulate the issue in quite this way, but it is apparent in her application of a multi-factor test, where she uses isolated miscellanea inherent in any commercial relationship to override the economic realities evident from her own findings.

This is a strange case – the ALJ's findings effectively mandate a conclusion that the Owner-Operators at issue are independent contractors, yet she decided otherwise. Nowhere is the error more obvious than in her conclusion that the extent of control factor favored employee status. Her actual findings are almost entirely about the almost complete lack of control XPO had over independent contractor drivers:

> *There was almost universal agreement from the drivers who testified that they decide which loads to accept, the number of hours to work, which shift to work, when to take time off from work, when to take breaks, selection of the delivery route, and exclusive control over the trucks they drive which includes most maintenance and repair decisions. Although the General Counsel argued that in practice drivers were retaliated against for rejecting loads, I find otherwise. The ICOC specifically allows drivers to reject loads without suffering negative consequences from the exercising of this right. The drivers' rights to reject loads was not merely theoretical.*

ALJD p. 15 (emphasis added and citations omitted).

Despite this overwhelming evidence of an absence of control, the ALJ found control based on little more than ancillary factors – such as the method of compensation – and the fact that XPO set delivery times *"based on the customer's request." Id.* (emphasis added). Not only is such a "balancing" facially invalid given the ALJ's findings, it also is inconsistent with clear law on this point: "[c]onstraints imposed by customer demands and government regulations do not determine the employment relationship." *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 501 (D.C. Cir. 2009) ("*FedEx I*") (citing *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 859 (D.C. Cir. 1995)); *see also Central Transp., Inc.*, 299 NLRB 5, 13 (1990).[1]

The ALJ's decision contains many similar errors, all of which lose sight of the complete independence of Owner-Operators by focusing on exceptions to the rule or characterizing undisputed evidence as diminished. For example, the ALJ accepts that the evidence showed that Owner-Operators hired second-seat drivers, but found that the right to hire did not exist because XPO refused to permit a single person who had been abusive to XPO employees to perform its work. Similarly, the ALJ found that Owner-Operators could not negotiate their agreements, despite accepting that a number of drivers even hired their own attorneys to do just that. The ALJ's decision contains many such judgments, which, when combined with her giving ancillary factors such as the frequency of payment excessive weight, improperly tip the scales against the reality of the independent contractor relationship here.

[1]To the extent that the Board's approach focusing on "significant opportunity for gain or loss" negates such complete lack of control, then the Board's standard is statutorily impermissible. The "right to control" is an essential and indispensable element of the common law standard. *See, e.g., Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) ("under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished"); *Garcia-Celestino v. Ruiz Harvesting, Inc.*, 898 F.3d 1110, 1119 (11th Cir. 2018) (right to control is "indispensable" to common-law agency analysis).

Ultimately, what the ALJ missed is the big picture, the reality of the economic relationship and the economic opportunity it creates for drivers. This reality, as borne out by her own findings on control as well as other evidence presented at the hearing, is that the Owner-Operators have such independent businesses that they have nothing but significant opportunity for gain or loss. The record is replete with such evidence, not the least of which is their need to find the most productive use of their six-figure capital investment in their businesses.

These ALJ compounds these errors by taking fairly typical commercial relationships and drawing unwarranted inferences from them. That approach is best illustrated by her flawed analysis of the relationship between the drivers, XPO, and XPO's customers. Repeatedly, the ALJ relied on the fact that XPO has control over "virtually all aspects of the company's interaction with [XPO's] clients" and that the drivers had "virtually no contact with the customer" to rule that various factors favored employee status. But that whole analysis simply fails to recognize that XPO and the thousand similar companies competing for their services are the drivers' customers. Common sense and experience teaches that businesses to not allow independent third-parties control their relationship with their customers unnecessarily.

The ALJ's approach of rejecting the unavoidable conclusion to be drawn from her own findings is repeated in her findings that XPO committed unfair labor practices. For example, she based her finding that XPO Safety Manager Enrique Flores in a conversation with driver Humberto Canales unlawfully engaged in interrogation, the solicitation of grievances, and the promise of benefits. The ALJ based this finding entirely on the testimony of Canales, despite her scathing rebuke of Canales as lacking credibility in every way. *See* ALJD p. 40-41.

The ALJ also found that XPO violated the Act by not providing Avalos with a loan for truck repairs in an unprecedented large amount. No evidence exists to support a violation that

XPO's actions were motivated by anti-union motivation. Once again, the Board need look no further than the ALJ's findings. She expressly found that XPO harbored no anti-union animus against Avalos. *See* ALJD p. 31. And yet, when it came to the denial of the loan, the ALJ concluded that the non-existent animus manifested itself, and in the form of a person who had no role in denying the loan. In any event, that finding is refuted not only by the General Counsel's failure to produce any evidence that similarly situated drivers that were treated differently, but also that valid business reasons existed to refuse a loan to Avalos. *Wright Line*, 251 N.L.R.B. 1083, 1089 (1980).

To say it again, this is a strange case. The Board need look no further than the ALJ's findings to find that her conclusions not only lack substantial evidentiary supports, but rely heavily on inferences not justified by the record. And when the evidence ignored or dismissed by the ALJ are factored into the equation, it becomes readily apparent that the decision cannot stand.

II. SUMMARY BACKGROUND

This matter stems from four charges brought by the International Brotherhood of Teamsters (the Charging Party) against XPO between April 24, 2015 and February 9, 2017. The charges alleged various unfair labor practices, including discrimination, interrogation, solicitation of grievances, and promises of benefits. Additionally, the Charging Party also alleged that the drivers were misclassified as independent contractors in violation, as an independent violation of Section 8(a)(1) of the Act. The General Counsel Issued an Order Further Consolidating Cases, Third Consolidated Complaint and Notice of Hearing on March 22, 2017. This case was tried in Los Angeles, California, on July 24 – August 3, 2017 and September 11 – 13, 2017 before ALJ Dibble.

In her decision issued on September 12, 2018, the ALJ held that the Owner-Operator drivers were statutory employees, not independent contractors. In so holding, the ALJ purported to rely on the Board's multifactor analysis. That analysis not only collapsed and confused many factors, it also failed to provide them with proper contextual weight. With respect to thirteen unfair labor practice charges alleged, she dismissed ten, finding only that XPO had violated the Act by 1) allegedly interrogating, promising benefits and soliciting grievances to Humberto Canales and 2) denying an large auto repair loan to Domingo Avalos to repair his truck that he negligently damaged. The ALJ severed and deferred ruling on the final unfair labor practice charge alleging that misclassification is itself an independent violation of the Act because it is currently being considered by the Board in *Velox Express, Inc*., N.L.R.B. Case No. 15-CA-184006.

III. STATEMENT OF THE CASE

A. Summary of XPO Cartage's Operations

XPO Cartage, Inc. is a company that has operated terminals in Commerce, San Diego, and Calexico, California since April of 2014.[2] The terminal at Commerce performs logistics coordination between customers, ports, and railyards in Southern California and in interstate commerce. *See* Trauner 1930; GC Exh. 72 at XPO2462. At the Commerce terminal, XPO employs approximately 22 staff employees, including dispatchers, customer-service workers, settlement specialists, office coordinators, safety specialists, dock workers, and managers. Trauner 1937. XPO does not itself physically move freight (as steam ship lines do), rail (as rail companies do), or road (as truck drivers do).

[2]Previously, an unrelated company, Pacer Cartage, Inc. ("Pacer"), which XPO acquired in April of 2014, operated the terminal. Camacho 1047-48.

Because XPO's functions are limited, it does not provide any equipment used in the movement of its customers' goods. XPO does not own the steamships or rent the port terminals, own rail cars or yards, own tractors, the chassis attached to the tractors, or the containers being hauled. Herrera 68-69; Camacho 1265; Maleski 1881; *see also* GC Exh. 60 at Section 1(C). All such equipment is provided by third parties. *See* Avalos 2054-55; Herrera 68-69. XPO's function is to coordinate all of these resources, entities, and owners with each other to move goods for its customers. *See* Trauner 1930, 1937; GC Exh. 72 at XPO2462.

B. Relationship Between Independent Owner-Operators and XPO Cartage

1. ICOC Agreement Between XPO Cartage and the Owner-Operators

One of the third-parties coordinated by XPO is the independent Owner-Operators of tractors which are used to haul freight over the road. Camacho 1172. In 2015, XPO required Owner-Operators to enter into an Independent Contractor Operating Contract (hereinafter "ICOC") with XPO. *See* GC Exh. 60.[3] As observed by counsel for the General Counsel: "Those contracts state in no uncertain terms, 100 times, that the drivers are independent contractors." Libby 29; *see also* GC Exh. 60 at 3.

A key provision of the ICOC guarantees the Owner-Operators' freedom to provide services to any company they choose.

> Contractor may operate the Vehicle for alternative uses. . . . Except as restricted by Applicable Law (including 49 CFR Part 376), nothing in this Contract will prohibit Contractor from performing transportation services for other carriers, brokers or directly for shippers.

[3]This agreement replaced the "Vehicle Lease and Independent Contractor Hauling Agreement" (hereinafter "ICHA") that Owner-Operators had signed with Pacer and which had remained in place. *See* GC Exh. 57.

GC Exh. 60 at Section 4(C). Section 12 of the ICOC underscores that Owner-Operators are not "prohibited from using Contractor's Vehicles for the pickup, transportation, or delivery of property for more than one motor carrier or any other person or entity." GC Exh. 60.

The ICOC is in effect for 90 days, at which point it must be renewed by the parties. Even within that term, an Owner-Operator can terminate for any reason by providing 30 days' notice to XPO. GC Exh. 60 at Section 21(A). XPO may terminate the ICOC only for material breach. Camacho 1172; GC Exh. 60 at Section 21(B).

As the ALJ found, the Owner-Operators new what they were signing when they entered into the ICOC. Upon introduction of the ICOC, XPO held numerous meetings with Owner-Operators to explain the agreement. *See, e.g.*, Camacho 1160-65. XPO distributed copies of the ICOCs, along with Spanish summaries, during these meetings. The Owner-Operators were given time (in some cases, months) to review the ICOCs. *Id.*; Canales 994-95, 999-1000; Gaitan 740; Montenegro 1467-68; Ackling 1527-28; Decoud 1607, 1616; Davis 1796. Numerous Owner-Operators engaged attorneys to negotiate the terms of the ICOCs, and changes were made to the ICOC based on these legal negotiations, as well as feedback received directly from Drivers. Camacho 1165-69, 1182-83.

Some Owner-Operators chose not to review the agreements, although they admitted that XPO gave them the opportunity to do so. *See* Herrera 176, 179; Gaitan 741. Approximately 20 Owner-Operators chose to terminate their business relationship with XPO rather than sign the agreements. Camacho 1167.

2. XPO Contracts Only With Owner-Operator Drivers That Possess Specialized Skills and Experience

As the ALJ found, drivers of the tractors at issue here have a highly specialized skill. To develop and hone these skills many drivers attend trucking school. Gaitan 715-716; Herrera 172;

Montenegro 1476-77; Canales 755-56. Because XPO does not manage or train drivers, it contracts exclusively with pre-qualified drivers who possess a Class A commercial driver's license. Maleski 1828-29.

Drivers also must have at least eighteen months of verifiable tractor-trailer driving experience. Maleski 1843-44. Federal regulations further require that drivers be proficient in areas such as "safe operations regulations," "CMV safety control systems," "backing," "extreme driving conditions," "hazard perceptions," "emergency maneuvers," "skid control and recovery," "relationship of cargo to vehicle control," "vehicle inspections," "hazardous materials," "fatigue and awareness," "air brakes," and "combination vehicles." 49 CFR §§ 383.111, 113. Beyond these basic requirements, some drivers possess special licensing endorsements such as Hazardous Material endorsements, which require additional testing and enable the Drivers to perform specialized deliveries. Del Campo 1700-01; Herrera 214-15; Avalos 423-24; Ackling 1552-53; Gaitan 715.

3. Owner-Operators Make Substantial Capital Investments In Their Businesses.

While all drivers of tractors have specialized skills, some choose to apply these skills to their own business. These drivers are referred to as Owner-Operators because they own the tractor that they operate. 49 CFR § 376.2. Herrera 122, 166, 231; Montenegro 1478; Ackling 1526; Lopez 598-99; GC Exh. 60 at Section 5(B). The tractor itself represents a massive capital investment, in excess of $100,000.00 merely for its purchase. Lopez 540-41, Montenegro 1457. Of course, as with any large purchase, some Owner-Operators finance this purchase. Lopez 628-29; Gaitan 744-45; Canales 912; Camacho 1133; Trauner 1966-67. XPO does not in any way assist with the purchase or financing of the trucks. Trauner 1968-69.

The decision of what truck to buy and how to buy it is one made exclusively by the Owner-Operators. GC Exh. 60 at Sections 1(A), 4(A)(1); *see also* Trauner 1968-69. Owner-Operators in fact obtain the trucks from a variety of sources. Montenegro 1464-65, 1502-03; Decoud 1605; Ackling 1526, 1533-34. The complete discretion Owner-Operators have with respect to their investment in equipment also is illustrated by the variety of trucks used and personalization of those trucks both inside and out. The trucks can be any color, make, or model. Montenegro 1462-63; 1464-65, 1502-03 Decoud 1605; Ackling 1533-34, GC Exh. 60 at Section 1(A), 4(A)(1). The Owner-Operators control the appearance of their truck, excepting only the Federal regulatory requirement that the logo of the company they are serving at the moment be on the truck. Flores 1314, 1364-65; Ackling 1563; Decoud 1605; Montenegro 1463; Maleski 1840-42.

Protecting their investment requires the Owner-Operators to responsibly maintain their tractors. Where, how, and when they do so is entirely their decision. Lopez 560; Camacho 1265; Flores 1311; Montenegro 1457, 1459-60; Decoud 1600. A failure to make good maintenance decisions can result in an expensive, and even catastrophic, loss. *See*, *e.g.*, Montenegro 1456-57. Major repairs easily can cost between $3,000 to around $24,000. Montenegro 1593-94, Avalos 459; Camacho 1102; Perez 1735, 1738, 1742-43.

4. Owner-Operators Take Advantage of Entrepreneurial Opportunities to Expand Their Business

Ultimately, Owner-Operators are responsible for putting their truck to profitable use. See, e.g., Montenegro 1445-46, 1507; Decoud 1581-82. They can do so in a number of ways beyond maximizing the productive use of their tractor. Those that have the financial capacity expand their business through the purchase additional tractors. Avalos 386-87; Davis 1775,

1792, Solis 2071, Montenegro 1452. As of the date of the hearing, approximately a dozen Owner-Operators at Commerce owned multiple trucks. Trauner 1953; Del Campo 1699.

Owner-Operators often hire "second-seat" drivers to operate their tractors. Trauner 1951-52, Avalos, 253-54, 350, 386-387, 401, 467-68, Canales 762, 904-06, Solis 2071-72, 2076, Gaitan 642, 716-17, Lopez 620-21, Montenegro 1452-53, Davis 1766-68, 1775. Recruiting and hiring second-seat drivers exclusively is the responsibility of the Owner-Operator. Montenegro 1453; Davis 1783-84. The Owner-Operators set the terms of engagement for second-seat drivers. GC Exh.60 at Section 11, Gaitan 643, Montenegro 1455; Davis 1792, Avalos 253-54, 384, 384; Canales 895, 904-06; *see also* Lopez 620-21. While XPO reviews qualifications of second-seat driver, this function is a legally required ministerial act to insure second-seat drivers are qualified operators of commercial motor-vehicle. Gaitan 715; Flores 1312-1313; Maleski 1849-51.

Owner-Operators choose to which of the over one-thousand competitors such as XPO they will offer their services. Trauner 1983-84; Decoud 1592. Many Owner-Operators have served many different companies. Avalos 464-465; Del Campo, 1700; Trauner, 1983-84; Trauner, 1983-84, 2029-30. One way they do this while under contract is through "trip leasing," which facilitates the simultaneous service of companies. 1592, 1612-13, 1632-35; Camacho 1137-38; Maleski 1866; Trauner 1985, Flores 1315-16, 1358, GC Exh. 60 at Schedule T.

5. Owner-Operators Have Control Over How They Operate Their Business

As the ALJ found, Owner-Operators have almost complete discretion over when, how, and where they will perform any work. The Drivers decide for themselves if and when they will work; no minimum amount of days is required. Canales 949-50, 955-56; Montenegro 1446; Decoud 1582-83; Ackling 1537; Gaitan 730-31. One driver testified, for example, he sometimes

chose to work six days on and then three days off, while at other times he chose to work only four or five days. 1590. Critically, he testified that "it's never the same. I do it just the way I kind of want to." *Id.* Even the General Counsel's witnesses admitted as much. Gaitan 646; Avalos 258; Herrera 99. Vacation decisions are made by drivers and they have no obligation to even inform XPO. Herrera 213; Montenegro 1451-52, Decoud 1590.

Because XPO typically operates 24 hours a day, no limitation exists on what hours the drivers can work. Trauner 1973. XPO does not schedule start times, end times, or shifts for Drivers. Montenegro 1445-46, 1507; Camacho 1138-39; Trauner 1981-82. That that Owner-Operators unilaterally decide when to drive based entirely on their preferences. Camacho 1138-39; Canales 793; Ackling 1538-39; Decoud 1583-84; Montenegro 1483-84.

Even what work they will perform when driving is decided by the Owner-Operators. Drivers are not assigned to any specific deliveries or regions. Decoud 1586. XPO frequently provides the drivers with multiple delivery options from which they can choose. *See, e.g.*, Decoud 1586; Ackling 1543, 1574, Rodriguez 1644-46, 1652. Owner-Operators reject loads not to their liking or from customers of XPO that they choose not to serve. Herrera, 104-05, Lopez 565; Rodriguez 1644-45; Decoud 1588-89, *see also* Decoud 1586; Ackling 1543, 1550-51 1574, 1610-11. In fact, the right to turn down work is an express term of the ICOCs. *See* GC Exh. 60 at Section 4(D). When such rejection happens, drivers are not penalized in any way. Camacho 1149-51; Rodriguez 1649; Del Campo 1698.

Once Drivers have accepted a load, the Driver is in control of the load and the manner of delivery. GC Exh. 60 at Section 10(A). XPO's limited role is to provide the Driver with delivery information and the customer's timeframe. Camacho 1126-29. Customer delivery windows differ, some deliveries have set times, some have 24-hour windows, and some have

multiple-day windows. Ackling 1551-52; Decoud 1597-98; 1625. Whatever the customer requirement, it is the drivers who determine the best method to timely complete their delivery. Decoud 1597-98; Ackling 1551-52. As a result, Owner-Operators may make multiple deliveries in what they determine is the most efficient and profitable manner. Canales 799-800; Decoud 1597-99. While performing this work, drivers are completely free to make meal and rest stops. *See* GC Exh. 60 at Sections 4(A)(1) and 11(A); Montenegro 1458-59; Ackling 1540; Trauner 1975.

In the performance of their deliveries, the Owner-Operators function with independence from XPO. That is a necessary incident of delivery work which is performed away from XPO's terminal. Gaitan 727. Such interaction as does occur is for the purpose of sharing the basic information needed to do the job, such as where to pick up a load and where to deliver it. XPO uses an application called SmoothCom to communicate this information to drivers and to verify deliveries. Camacho 1135-36, 1202-03; Trauner 1977-81. XPO does not use GPS, or any other device, to track or monitor Drivers. Camacho 1135-36, 1203; Trauner 1977-81.

Significantly, the Drivers, unlike XPO employees, are not subject to XPO's employee rules and policies. Montenegro 1459; Decoud 1600; Trauner 1938-1951, 1986; Respondent's Exh. 42. The Drivers are not subject to any dress code or grooming standards while working for XPO. Montenegro 1459; Decoud 1600; Trauner 1986. Although basic safety regulations require all persons at the XPO terminal to wear a safety vest, even here drivers may wear a safety vest of their choosing. Herrera 220-21; Avalos 314, 427-28; Camacho 1107-09. Nor are the Drivers subject to any performance reviews, discipline, evaluations, audits, or ride-alongs. Trauner 1982, 1946; Decoud 1607. The limited oversight XPO does perform is required by law, such as

removal from service for certain conditions or hazardous material training. Flores 1313, 1343-44; Decoud 1607; Maleski 1879-80; Trauner 1981, 2022-23.[4]

6. XPO Compensates Owner-Operators as Independent Contractors

Owner-Operators do not receive an hourly rate and are not guaranteed any revenue from XPO. Canales 949, GC Exh. 60 at Section 12; Montenegro 1468. Rather, on a weekly basis, XPO compensates Owner-Operators pursuant to the ICOC based the type of delivery and the distance traveled in miles. Lopez 575-76; Camacho 1261.

While the ICOC includes the basic terms of compensation, the drivers can and do negotiate changes to their compensation. GC Exh. 60 at Schedule B at Section 2: "Changes In Fees." *See also* GC Exh. 57 (ICHA) at Exhibit C. Also, as a result of concerns raised by the Drivers, changes have been made to the payment terms in the ICOCs. Camacho 1182-83. Beyond these negotiations on ICOC terms, in many cases involving deliveries that cannot be handled in the normal course, spot negotiations occur which lead to higher rates for these deliveries. Rodriguez 1651; Del Campo 1702-05.

Drivers' hours are not tracked, rather they are paid based on proof-of-delivery documents. Gaitan 730; Ackling 1562. Owner-Operators also are paid flat fees for tasks such as tying down loads with chains, blanketing loads, making extra stops, making a chassis flip, making a chassis split, or cleaning out containers. GC Exh. 60 at Schedule B. Owner-Operators occasionally are paid for detention time if they wait at a customer site for more than one hour to make a delivery.

Consistent with their work and payment as independent contractors, XPO does not provide drivers with any benefits or insurance, nor does XPO withhold any taxes from the

[4]Extensive Federal regulations exist governing the relationship between XPO and independent contractors. *See, e.g.*, 49 CFR Parts 376, 387, 390, 391, 393, 395.

drivers' payments. *See* GC Exh. 60 at Schedule N(2), (4); GC Exh. 57 at Section 3(G)-(H). While XPO will make payments on behalf of drivers for some expenses, those payments are made only upon request of the driver and funded entirely by the drivers through deductions. *See* GC Exh. 60 at Schedule N(2), (4), Del Campo 1703-04, 1716. The Owner-Operators indemnify XPO for various losses or damages that may arise during the performance of their services. *See* GC Exh. 60 at Sections 6(A)(7), 20; GC Exh. 57 at Sections 8(A), 8(E), 9.

As a result of all these variables in compensation, and the ability to manage expenses, compensation among Owner-Operators directly is linked to their entrepreneurial efforts. The highest-earning Owner-Operator last year earned over $500,000. Trauner 1959-60. On the other end of the spectrum, some Owner-Operators earn $25,000 or less. *Id.* In between those extremes are Owner-Operators like Mike Ackling, who made over $90,000 last year, after deducting expenses. Ackling 1561.

C. Enrique Flores's Conversation with Humberto Canales.

On or about May 5, 2015, Humberto Canales, then an Owner-Operator and an open union supporter, and Enrique Flores, at that time the safety manager at XPO Cartage, had a conversation in the XPO Cartage Terminal in Commerce. Canales 977. Both parties acknowledged that the conversation took place, and that they had a pre-existing friendly relationship. Canales 993; Flores 1328-30. In fact, Canales spoke favorably of Flores, testifying that "he has a little more understanding towards us. He would hear us more." Canales 875.

The crux of the allegation supporting the charge is that Canales alleged that Flores asked him what he did not like about the Company, why he was involved with the Union, and how many Drivers were involved in the campaign. Canales 845-46. With respect to the solicitation of grievances, the sole basis ALJ's finding that an unlawful solicitation occurred is Canales' claim that Flores asked him "what would [he] change in order to make an excellent company?"

Canales 849. Flores acknowledges that he may have made such a statement. Flores 1331. The ALJ's further found that Flores made an unlawful promise when he allegedly told Canales that he would ask if the company could cancel Canales' truck and insurance payments for the two weeks that Canales had recently taken off work. Canales 847. Flores disputed Canales' recollection, stating that he never made such a promise. Flores 1331-32.

D. XPO Did Not Fail to Qualify Domingo Avalos For a $20,000+ Loan In Violation of the Act.

Despite finding that XPO exhibited no anti-union animus toward Avalos, the ALJ found that XPO discriminated against Avalos by failing to provide Avalos with a $20,000 loan to repair his tractor's engine. The ALJ found anti-union motivation because of an email referencing the union that was sent after the loan already had been denied by a person who assumed his role at XPO only after the denial of the loan.

Sometime in the end of 2014 or beginning of 2015, it appears that Avalos' truck started exhibiting problems. Avalos took his truck to a mechanic, Jesus Perez, asserting that his truck had low oil pressure. Perez 1725. When Perez looked at the truck, he learned that it was 5 gallons low on oil and that the check-engine light had recently gone off at least 765 times. He concluded that Avalos' tractor's problems were "very alarming." Perez 1725-30, 1742-43. Perez told Avalos that his truck needed to be further examined in order to avoid catastrophic failure; but Avalos refused. He instructed Perez to just add oil, and that if anything happened to the truck, the Company would simply take care of it. Perez 1730, 1751. Avalos also told Mario Montenegro, another Owner-Operator, that he would simply drive the truck until his engine blew out. Montenegro 1472-73, 1509-12.

Three weeks later, Avalos' engine had completely seized. Perez 1730-31. Perez described the damage as "catastrophic," and a result of Avalos' negligence. Perez 1730-34. On

March 27, 2015, Perez emailed then-current XPO general manager Hector Banuelos regarding Avalos' truck, attaching a quote for almost $24,000.00, and explaining that the truck was in serious disrepair. Resp. Exh. 31. From March 31 to April 7, 2015, Banuelos and XPO management debated whether to provide a loan Avalos' despite his obvious negligence. Resp. Exh. 17. A few days after April 7, Perez told Avalos the company had denied his loan request. Avalos 345-46.

Subsequent to the denial of the loan, Banuelos left XPO, to be replaced by Miguel Camacho. Avalos 346-47, 477; Camacho 1102-03. Avalos renewed his request for a loan through Camacho. Camacho 1103-04. Although Camacho reminded Avalos that the loan had been denied, he did renew Avalos' request for a loan. Because Avalos recently was featured in an article about the union and due to Camacho's lack of familiarity with union issues, Camacho sent a link to the article to management in connection with the loan request. Camacho's concern was not animus, but how a loan would be "perceived" in this environment Camacho 1189-90.

Despite XPO already denying Avalos' loan request, Camacho tried to be helpful to Avalos. He asked Avalos if Avalos would be willing to contribute to the repair of his own truck. Camacho 1103-04. Avalos told Camacho that he would not be able to put down *any* amount of money for the repair. Avalos 477-78; Camacho 1104-05. On June 23, 2015, Camacho updated management writing: "I followed up with Domingo and he stated he cannot come up with anything on his end…If we decide authorize the repair and set up a deduction for Domingo it would be in the area of $200.00 a week for 2 years. I think because of his heavily [sic] involvement with the teamsters they would try to use it against us. Thoughts?" GC Exh. 75.

Ultimately, due to the great size of the loan request, the fact that Avalos would not put any money down, and the reports of Avalos' negligence in maintaining the truck, XPO reaffirmed its decision to decline the loan request. Camacho 1105-06.

IV. ARGUMENT

A. The ALJ Ignored the Evidence and Her Own Findings in Concluding that Owner-Operators were not Independent Contractors

In concluding that the Owner-Operators are employees and not independent contractors, the ALJ conducted a *pro forma* application of a multi-factor test. The ALJ listed ten factors guiding her analysis:

a.) The extent of control which, by the agreement, the employer may exercise over the details of the work.

b.) Whether or not the one employed is engaged in a distinct occupation or business.

c.) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.

d.) The skill required in the particular occupation.

e.) Whether the employer of the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.

f.) The length of time for which the person is employed.

g.) The method of payment, whether by the time or by the job.

h.) Whether or not the work is part of the regular business of the employer.

i.) Whether or not the parties believe they are creating the relation of employer and employee.

j.) Whether the principal is or is not in the business.

The ALJ then reviewed what she saw as merely one additional factor, "significant entrepreneurial opportunity for gain or loss."

Unfortunately, the ALJ engaged in the precise rigid and categorical application of these factors which the Courts and the Board repeatedly have held is improper. *See, e.g., NLRB v. United Ins. Co. of Am*., 390 U.S. 254, 258 (1968); *Int'l Union of Operating Engineers Local 487 Health & Welfare Tr. Fund*, 308 N.L.R.B. 805, 806 (1992). What the ALJ's decision demonstrates is that she failed to view the entire relationship through the lens of economic opportunity or risk that reveals the economic realities. *FedEx Home Delivery v. NLRB*, 849 F.3d 1123, 1126 (D.C. Cir. 2017) ("*FedEx II*").

Instead, the ALJ simply engaged in a scorecard approach – finding that "there are more factors favoring employee status . . ." ALJD at 23. That error is fatal here because even the ALJ's own findings in many cases do not support her conclusions. The evidence clearly shows that the economic reality is that the drivers are independent business entities, each of which shouldered on their own the entire economic risk of keeping their enterprise in business. Accordingly, under the law, Owner-Operators must be considered independent contractors.

1. The Significant Opportunity for Profit and Loss Demonstrates that Owner-Operators are Independent Contractors.

a. The ALJ's Conclusions Regarding the Owner-Operators' Entrepreneurial Opportunities are Clearly Erroneous

The Owner-Operators Have A Significant Proprietary Interest in Their Work. In her decision, the ALJ concluded that the Owner-Operators "had no significant proprietary interest in the overall business." ALJD p. 23. Obviously, the ALJ could not have been referring to a proprietary interest in XPO. The statement necessarily must mean the Owner-Operators' investment in their hauling business.

Clearly, the Owner-Operators have a proprietary interest in that business. They own the sole asset relevant to that business – their tractors. The ALJ rejects this interest, merely stating that the "drivers had no substantive interest in the work *other than their investment in the truck*,

which in many cases they did not even own" ALJD p. 23 (emphasis added).[5] But their six figure investment in the truck is the point, it is standing alone sufficient as a matter of law. And it matters little whether that interest is through a purchase or a lease, the right conveyed to operate the truck is the same. This obvious and common sense proposition has been recognized by the Board, which has found in similar circumstances that Owner-Operators have a significant proprietary interest in their work where they are solely responsible for owning or leasing their own truck. *See Argix Direct, Inc.*, 343 N.L.R.B. 1017, 1020 (2004).

The record evidence also shows that this interest in the tractors is substantial, providing Owner-Operators with the freedom to sell their services to any carrier. William Ackling came to XPO with his truck after stints working for at least two other trucking companies. Ackling 1520-21. Even Avalos admitted that drivers moved their tractors freely, testifying that he lost a driving job because the Owner-Operator he was working for took his truck to another company. Avalos 351. This ability to freely employ the tractor in the service of businesses other than XPO is as a matter of law "a significant proprietary interest in the instrumentalities of their work." *Argix Direct*, 343 N.L.R.B. at 1020.

Although difficult to discern given the ALJ's overlapping and confusing analysis,[6] her rejection of this proprietary interest appears to be based on a belief that such a proprietary interest requires that drivers be able to "work[] simultaneously for another company and the Respondent." ALJD p. 23. Aside from being contrary to the record, this finding is contrary to the law. All that is required is "the ability to work for other companies." *FedEx Home Delivery*,

[5]This "did not even own" language again demonstrates the lengths to which the ALJ went to obscure economic realities. The record was clear that Owner-Operators either purchased or leased their trucks. Herrera 122, 166, 231; Montenegro 1478; Ackling 1526; Lopez 598-99, 628-29; Gaitan 744-45; Canales 912.

[6]*E.g.*, "[M]any of the factors considered in determining whether the employer or worker exercises control over their work also applies to entrepreneurial opportunity" ALJD p. 22.

361 N.L.R.B. 610, 637 (2014). That the ALJ's gloss of simultaneous work is in error is evident from the nonsensical results that would flow from such a standard. Under the ALJ's approach, an Owner-Operator beholden to XPO but able to take other assignments would be an independent contractor, while an Owner-Operator unable to perform simultaneous work, but free to change jobs on a daily basis would be a statutory employee.

Even if one accepts the legally flawed "simultaneous work" doctrine created by the ALJ, the record still requires rejection of the ALJ's conclusion. Uncontroverted evidence established that several Drivers have, within the past couple years, simultaneously provided transportation services for XPO and a separate business at the same time. Avalos 464-465; Del Campo, 1700; Trauner, 1983-84, 2029-30; Del Campo, 1700. The ALJ's problem with this evidence was that the record did not support that drivers, in practice, frequently worked for multiple companies. That approach properly was rejected by the D.C. Circuit in *FedEx I*, which observed that opportunity, and not practice, is controlling. *FedEx I*, 563 F.3d at 497. Indeed, the Board's and the ALJ's formulation would create an absurdity – for entrepreneurial freedom to exist under Board law, *drivers would have to be deprived of the freedom to contract* exclusively with one company that offered them the best terms.

The ALJ also appears to have based her finding that the drivers had limited opportunity to move based on the fact that many did not move, effectively ignoring the massive opportunities Owner-Operators have to pick and choose where they will provide services. Well over a thousand different companies are competing for the services of the Owner-Operators in the Los Angeles area alone. Trauner 1962. With so many competitors in the marketplace, the only fair inference is that an Owner-Operator's decision to contract with any company is virtually unlimited and certainly unrestricted. Twenty drivers demonstrated this mobility the market

provides when they left XPO's service almost immediately upon XPO's introduction of the ICOC. Camacho 1167. But the ALJ ignored this evidence, and instead concluded without any basis the fact that many drivers *chose* not to move meant that they could not move.

XPO Is The Owner-Operators' Customer. Another error in the ALJ's economic risk analysis, and one which infects many of her findings, is her elevating customer contact to primary touchstone of entrepreneurial opportunity. The ALJ found significance in her finding that XPO controls "virtually all aspects of the company's interaction with the clients" and that XPO solicits the client base, negotiates shipping contracts with the clients and interacts with the clients regarding scheduling" while the "driver has virtually no contact with the customer." ALJD p. 14. Further, when discussing payments that XPO "negotiates with clients without input from the drivers over the rates it will charge the customers." ALJD p. 19.

The ALJ's focus on contact with XPO's customers simply is inconsistent with Board law. In *Dial-a-Mattress* the contractor delivery drivers at issue were found to be independent contractors even though they did not set prices or cultivate mattress customers. *Dial-a-Mattress Operating Corp.*, 326 N.L.R.B. 884 (1998). Similarly, in *Arizona Republic*, the Board found that newspaper carriers were independent contractors despite a lack of direct contact, such as billing, extending credit, and collecting payments with newspaper subscribers. *Arizona Republic*, 349 NLRB 1040, 1043 (2007). Very simply, the absence of contact with the customers of third-parties simply does not carry the significant weight given to it by the ALJ.

The ALJ's conclusion also overlooks a feature of the intermodal business. Unlike the situation where a company hires drivers to move its own goods on a regular basis, the intermodal business here is one where over a thousand companies compete for the services of both the Owner-Operators and the shippers. In this environment, it is companies like XPO that are the

Owner-Operators' customers. Once the business relationships are properly understood, it is readily apparent that the Owner-Operators have extensive interaction with their own customers -- XPO and similar companies.

b. The Owner-Operators Take Advantage of Actual Entrepreneurial Opportunities

Correction of these patently erroneous findings brings clarity to the remaining evidence which underscores that Owner-Operators are fundamentally entrepreneurial. Most notably, the drivers make large, six-figure capital investments in the trucks that they use to ply their trade. As many of the Owner-Operators finance their trucks, the drivers must make regular payments on the trucks or risk losing them. The risk is borne exclusively by the Owner-Operators – they are not guaranteed an income by XPO. *See Porter Drywall*, 362 N.L.R.B. No. 6 (2015) (lack of guaranteed income favors independent contractor status). Only in generating revenue through the use of this equipment can they pay off their investment in the truck and maintain it so it stays on the road.

Every aspect relevant to generating that revenue is within the exclusive control of the Owner-Operators. It is the Owner-Operators who determine the days and hours to operate the truck, or even whether to operate at all. Canales 949-50, 955-56; Montenegro 1445-46; Decoud 1582-83, 1590; Ackling 1537; Gaitan 730-3. It is the Owner-Operators who decide what loads to take or turn down. Herrera 104-05. It is the Owner-Operators who decide whether to employ additional drivers, and in that way increase the time that the truck is in productive use, rather than sitting idly. Davis 1794-95; Montenegro 1489. It is the Owner-Operators who set the compensation for these drivers. Avalos 253-54, 384; Canales 895, 904-06.

Owner-Operators Have Control Over Hiring Second-Seat Drivers. Many Owner-Operators hire second-seat drivers to drive for them. The ALJ did not find to the contrary, but

rather sought to discount such hiring on the grounds that Owner-Operators do not enjoy "true control" over the hiring of second-seat drivers. ALJD p. 23. She based that incorrect finding, in part, on the fact that XPO had to approve such hiring. But that oversight is imposed by federal regulation. No driver – including a second-seat driver – can drive a commercial motor vehicle unless they complete and furnish to the federally regulated motor carrier – in this case XPO – an application for employment meeting certain content requirements. 49 C.F.R. § 391.21. All XPO does is the legally required ministerial act of ensuring that second-seat drivers complete "employment applications" consistent with federal and local regulations. Gaitan 715; Flores 1312-1313; Maleski 1849-51. Complying with regulations cannot suggest employee status. *FedEx I*, 563 F.3d at 501.

Nor does the ALJ's finding that XPO's refusal to approve the hiring of Humberto Canales support her finding that Owner-Operators did not control hiring. The ALJ reasoned that "if the driver had true control over hiring the second-seat driver, ….the driver should have been the ultimate decision maker." ALJD p. 23. But nothing in the record supports the finding that the Owner-Operator could not hire Canales. All that XPO did was prohibit Canales, a driver with a prior history of threatening, hostile, and intimidating behavior, from performing work for XPO. In any context, an employer has a right, and sometimes an obligation, to prohibit persons who have been abusive to its employees from performing its work.

The Ability to Operate Multiple Trucks is a Real Economic Opportunity. The ALJ's analysis also ignored her own findings that Owner-Operators have the ability to increase their opportunity (or risk) by purchasing multiple trucks. Obviously, to operate multiple trucks, one also engage multiple drivers, another decision that adds to the economic calculus which the drivers must make. The ALJ dismissed these opportunities on the grounds that they were more

theoretical than real. But that simply is inconsistent with the record as a significant number of Owner-Operators contracting with XPO exercised this right. Avalos 386-87; Davis 1775, 1792, Solis 2071, Montenegro 1452.

But even if the number of drivers buying multiple trucks are few, it is error to make the leap that it cannot be done. *The Arizona Republic*, 349 N.L.R.B. at 1045. Such assumptions are particularly unfounded where the record fails to even suggest that purchasers of additional trucks encountered any obstacles of any sort. Even if one accepts everything the ALJ found, and the General Counsel and Charging Party argued, none of it supports the case that the drivers with the financial wherewithal could not simply buy a truck. To the contrary, that's exactly what these drivers did to get their existing trucks. And while the Board in *FedEx*, 310 N.L.R.B. at 624 observed that the failure of many drivers to take the opportunity might indicate the limitation was more theoretical than real, the ALJ erred when she merely assumed, without record support, that because some drivers have not expanded their business it means that they cannot do so.

The Wide Range of Owner-Operators' Compensation Conclusively Demonstrates Entrepreneurship: While this evidence of "significant Entrepreneurial Opportunity for Gain or Loss" is unequivocal, possibly the ultimate proof of economic risk is the undisputed record evidence of the wide disparities in incomes of Owner-Operators, from Avalos' complete loss of his business to another Owner-Operator earning over $500,000 in a year. Trauner 1959; *see Argix Direct*, 343 NLRB at 1021 (the Board found it relevant that the Owner-Operators' gross payments "var[ied] greatly…from a low of $42,911.68 to a high of $92,129.77"). The ALJ did not even attempt to proffer an alternative explanation for these disparities. But particularly given the ALJ's findings that the ICOC is standardized, the only logical inference is that these disparities are the result of the entrepreneurial opportunities discussed above.

The Experience of Domingo Avalos Underscores the Owner-Operators' Significant Opportunity for Profit and Loss. Quite possibly, the ALJ's findings in connection with Avalos' discrimination charge brings into sharp focus the substantial risk Owner-Operators take. At issue in this case is XPO's denial of a tractor repair loan to Avalos. *See, supra.* p. 15-16. The need for the loan arose only because Avalos made a decision to drive a damaged truck to the point of failure rather than to make interim repairs. His is a textbook story of economic risk taking in connection with the operation of a business. Avalos alone made a decision to risk the failure of a capital asset (the tractor). He made this decision after evaluating at least two factors critical in the context of seeking to maximize profit – (1) the relative benefits of paying from maintenance now as opposed to more expensive repairs later and (2) the belief that he could obtain financing to perform such repairs on favorable terms. Another factor implicit in this analysis is that his continued use of a damaged truck would produce revenue sufficient to make the higher cost of deferred maintenance worthwhile.

That this type of decision entails substantial economic risk is evidenced by the result of making an incorrect decision. When Avalos' truck did fail, and he was unable to pay for the repairs, he was out of business. He no longer was an Owner-Operator able to employ his capital in pursuit of his own interests. Instead, he became a second-seat driver for another Owner-Operator, Marco Ruiz. It is an obvious example of the significant economic risk taken by Owner-Operators.[7] What happened to Avalos is the very definition of economic risk, complete with the opportunity for profit, or in this case, loss.

[7]The Board itself has recognized in other contexts that the decision to conduct or defer maintenance is entrepreneurial. *See, e.g. UOP Inc.*, 272 N.L.R.B. 999, 1000 (1984)(closure of plant due to obsolete equipment). It was no less for Avalos.

2. Analysis of the Remaining Factors Demonstrates that the ALJ's Finding of Employee Status is Untenable.

a. The ALJ Failed to Conduct the Multifactor Analysis Required by Board and Court Decisions

The ALJ's remaining analysis of the determinative factors not only is flawed legally, but also improperly conflates issues to create support for findings that do not exist.[8] While the ALJ purported to review each factor separately, she repeats the same analysis and relies on the same evidence for multiple factors. For example, the ALJ makes extensive use of one contention – the irrelevant notion that the Owner-Operators had a lack of contact or negotiations with XPO's customers. That single analysis is a basis with regards to three different factors – extent of control, method of compensation, and entrepreneurial opportunity. Similarly, the ALJ's erroneous finding that the drivers were not free to hire second-seat drivers underlies her analysis of multiple factors – whether the employer and the individual are in the business and entrepreneurial opportunity for profit and loss.

This approach provides an illusion of a multifactor analysis when the ALJ is in fact merely using a limited number of findings to create evidentiary support for an employee relationship that does not exist.[9] It is particularly flawed in the context of her approach of tallying the factors to determine that those in favor of employee status outnumbered those in favor of independent contractor status. It is an approach that stacks the deck in light of a weak record of employee status by double and triple counting the same facts. It is on its face a failure

[8] The ALJ found three factors – extent of supervision, the skill required for the particular occupation, and whether the employer or individual supplies the instrumentalities, tools, and the place of work -- weighed in favor of independent contractor status. Although her analysis of these factors makes some of the same errors as exist in other areas of her opinion, it is unnecessary to address those errors given the conclusion she reached.

[9]Not only does the ALJ recycle evidence in her analysis, she also improperly collapsed three of the factors -- "whether the drivers are engaged in a distinct occupation or business"; "whether the drivers' work was part of the Respondent's regular business" and "whether the principal is or is not in the business" -- all into one inquiry rather than treat them individually. ALJD p. 15-17

to properly balance and evaluate all factors. *Austin Tupler Trucking*, 261 NLRB 183, 184 (1982); *see also FedEx I*, 563 F.3d at 487 ("some controls are more equal than others").

b. The ALJ's Analysis of the Extent of Control Factor is Obvious Error

Possibly the most important factor, and one which the ALJ erroneously found favored a finding of employee status, was the alleged extent of control by the employer. While every case involves the assessment of "all of the incidents of the relationship," *NLRB v. United Insurance Co. of America*, 390 U.S. at 256, the Board and the Courts historically focused on the right to control that was the foundation of the common law standard incorporated into the Act. *Id.* at 258. Control is "a function of the amount of control that the company has over the way in which the worker performs his job." C.*C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 858 (D.C. Cir. 1995). The Courts have made clear that this analysis is mandatory, or as the D.C. Circuit put it "it is a requirement that reflects clear congressional will." *FedEx I*, 563 F.3d at 496. As such, it cannot be ignored or treated cavalierly by the Board.

The ALJ concluded that the extent of control favored employee status, but her conclusion is quite simply wrong. To prove that, one need look no further than her own findings, which is worth quoting in full.

> *There was almost universal agreement from the drivers who testified that they decide which loads to accept, the number of hours to work, which shift to work, when to take time off from work, when to take breaks, selection of the delivery route, and exclusive control over the trucks they drive which includes most maintenance and repair decisions. Although the General Counsel argued that in practice drivers were retaliated against for rejecting loads, I find otherwise. The ICOC specifically allows drivers to reject loads without suffering negative consequences from the exercising of this right. The drivers' rights to reject loads was not merely theoretical.*

ALJD p. 15 (emphasis added and citations omitted).

Against this absolute ability of the Owner-Operators to decide when, where, and how to perform their work, the ALJ balanced only one piece of significant evidence – XPO's setting delivery times. But the decision makes clear that these times were "*based on the customer's request.*" *Id*. Even that hardly was absolute, as the ALJ found that "a tiny portion of the Respondent's customer base allows some flexibility in the delivery times, . . ." *Id*.

The error is two-fold. First, it is legally flawed. "Constraints imposed by customer demands and government regulations do not determine the employment relationship." *FedEx I*, 563 F.3d at 501 (citing *C.C. Eastern*, 60 F.3d at 859); *see also Diamond L. Transp.*, 310 NLRB 630, 631 (1993). Second, in context of the multifactor analysis the ALJ is required to perform, it is an inconsequential fact that cannot possibly outweigh the overwhelming evidence of independence that she found. Factually, logically, legally, her finding is erroneous.

The remainder of the ALJ's analysis of the key control factor under the common law test encompasses a page and a half of miscellanea which seeks to make something of an almost complete lack of control. But even the cases relied upon by the ALJ demonstrate that it is the indicia of control that she dismissed that is most probative of control. For example, in *Time Auto Transp., Inc*., 338 N.L.R.B. 626, 637 (2002), the evidence established that the company selected and controlled the equipment used by the drivers in its car hauling operation, including dictating the vehicles to be purchased. Even in the performance of their daily work, the company required drivers to check-in twice and day, had to approve drivers' vacations, and subjected them to disciple for failure to follow work rules.

Similarly, *Roadway Package Sys., Inc*. 326 N.L.R.B. 842, 844 (1998), it was the company that set precise specifications for the equipment drivers purchased, which trained the drivers, and enforced a rigid policy requiring daily attendance. And in *Slay Transportation Co.*,

Inc., 331 N.L.R.B. 1292, 1292-93 (2000), employees not only worked side-by-side with independent contractors, they also were subject to the same employment standards, including performance, safety and attendance standards. Not only did none of the independent contractors have more than one vehicle, but the company also strictly prohibited the use of that vehicle for any other purpose. Not merely some, but all of these incidents of real control are completely lacking in this case.

What the ALJ did rely upon simply does not amount to "the actual Supervision exercised by a putative employer over the 'means and manner' of the workers' performance." *Seafarers Int'l Union v. NLRB*, 603 F.2d 862, 873 (D.C. Cir. 1978). For example, the ALJ cites as one factor in her evaluation of control the legally irrelevant issue that the XPO name appears on the truck, noting the "requirement that the trucks are branded in the Respondent's name when delivering for its clients" ALJD p. 14. Such signage is a regulatory requirement, which, as already noted, indisputably is not a factor that may be considered in determining control. *FedEx I*, 563 F.3d at 501; *Diamond L. Transp*., 310 N.L.R.B. at 631.

Similarly, the ALJ makes much of the alleged inability of the drivers to interact with customers of XPO. As discussed above, that argument simply is wrong. It also has the control issue exactly backwards. If the drivers were charged with dealing with XPO's customers, those dealings would have to be monitored in some way by XPO if for no reason other than to protect the customer relationship. That kind of close supervision of customer contact is exactly what the Board found created an employee relationship in *Sisters Camelot*. 363 N.L.R.B. No. 13 (Sept. 25, 2015).

Nor can the fact that XPO uses a standardized contract, particularly in the context of this case, change the control analysis in any material way. First of all, if a "company sets the

standardized [contract] terms and in some instances unilaterally changes them, even if true, [that] is indicative only of relative bargaining power, not an employee-employer relationship." *Crew One Prods., Inc. v. NLRB,* 811 F.3d 1305, 1313 (11th Cir. 2016). The specific issue the ALJ raised was the inability to negotiate terms, dismissing the evidence that such negotiations not only took place, but also resulted in changes to the ICOC. But once again, the ALJ applied her unsupported, subjective value judgments to conclude it simply was not enough negotiations.

The ALJ further concluded that the type of insurance drivers must maintain under the ICOC established control. However the evidence presented at trial, as acknowledged by the General Counsel in its post-hearing brief, shows that this is anything but. The drivers are not beholden to purchase the insurance set forth in the ICOC – drivers are able to shop around for other insurance and purchase insurance elsewhere. Indeed, there is uncontroverted evidence that there are drivers who do so. Trauner 2037. The reason that the drivers purchase the insurance set forth in the agreement has nothing to do with XPO control and everything to do with the drivers being rational consumers – the insurance is cheaper than other insurance on the open market and comes with the convenience of being able to pay for it with a deduction from payments received from XPO. Davis 1770-71. In other words, they make an independent decision to maximize profit.

Finally, the ALJ asserts that XPO controls the type of equipment used in deliveries. While nothing in the ALJ's decision illuminates the ALJ's basis for this assertion, it is a plainly erroneous finding. XPO does not provide the drivers' trucks or even dictate their appearance -- the trucks used by the drivers can be any color, make, or model. Montenegro 1462-63; 1464-65, 1502-03; Decoud 1605; Ackling 1533-34, GC Exh. 60 at Section 1(A), 4(A)(1). Nor does XPO provide the trailing equipment (container, chassis and trailers) – they are provided by third

parties, such as the delivery clients and the railyards. Avalos 2054-55; Herrera 68; GC Exh. 60 at Section 1(C).[10]

Standing in stark contrast to the ALJ's scattershot and erroneous analysis is *C.C. Eastern*, where the D.C. Circuit held on almost facts involving an intermodal company that the company did not have control over Owner-Operators. In that case, as with XPO, C.C. Eastern did not set specific work hours for the drivers, which used their own tractors to perform the work. Those tractors were chosen by the drivers, and were not required to be of any specific type, size, or color. *Id.* Entirely consistent with the facts here, it was the driver who exercised control over their pick-ups and deliveries, including deciding (1) what roads to take, (2) when to take breaks, and (3) when to start and stop work. *Id.* at 859. Similarly, C.C. Eastern left it to the drivers to decide when and whether to perform maintenance and repair work on the tractors, the cost of which the drivers bear. *Id.* Nor did C.C. Eastern control the drivers' dress or appearance; or subject them to a conventional disciplinary system. *C.C. Eastern*, 60 F.3d at 858. *C.C. Eastern's* analysis compels the same result here – XPO does not have the control over the drivers required to make them employees under the Act.

c. The ALJ's Other Findings In The Multifactor Analysis Are Likewise Erroneous.

What remains following the economic risk and control analysis are a multiplicity of factors that even if the ALJ had not erred in her conclusions cannot overcome the economic reality of independence demonstrated by the economic risk and control factors. But the ALJ did err, giving even less meaning to these factors. *See FedEx I*, 563 F.3d at 487 (admonishing that "some controls are more equal than others" in the common law agency test).

[10] The ALJ also discusses the manner in which the drivers were compensated, which is an entirely separate factor addressed elsewhere, as opposed to an element of the control analysis.

Whether Parties Believed they Were Creating an Employer/Employee Relationship. The ALJ's finding that all Owner-Operators contracting with XPO believed they were employees is an unsupportable leap, accepting a few drivers' testimony over extensive evidence to the contrary. Most significantly, the ALJ found that the ICOC clearly identified the relationship as an independent contractor relationship and expressly the rejected the argument that the drivers did not understand the agreement. The ICOC is a persuasive contemporaneous document showing exactly what the drivers intended at the time they entered into the relationship. Such independent-contractor agreements constitute *strong* evidence that the parties believed they were creating an independent-contractor relationship. *See, e.g.*, *Arizona Republic*, 349 N.L.R.B. at 1045; *St. Joseph News-Press*, 345 N.L.R.B. 474, 479 (2005); *Dial-A-Mattress*, 326 N.L.R.B. at 891; *Central Transport*, 299 N.L.R.B. at 13; *see also Roldan v. Callahan & Blaine*, 219 Cal. App. 4th 87, 93 (2013), as modified (Sept. 18, 2013) ("courts must also presume parties understood the agreements they sign, and that the parties intended whatever the agreement objectively provides, whether or not they subjectively did").

The ALJ rejected this contemporaneous expression of intent based on little more than the fact that drivers could not negotiate their independent contractor status and the claims of a few drivers that they believed they were employees. Merely stating the premise clearly demonstrates the fallacy of the former – that XPO could not hire independent contractors unless it allowed them to negotiate to be employees. As for what the self-interested complaining drivers claimed they believed, other neutral Owner-Operators testified otherwise. These neutral Owner-Operators testified that they understood that they were establishing an independent contractor relationship. The ALJ did not make any credibility findings to resolve this conflicting testimony, she merely ignored it.

Beyond that, the ALJ's error is patently obvious when context is considered. No employee reasonably believes that they have unfettered discretion to set their own hours of work, reject work assigned by the employer, or take vacation whenever they choose, among other things – that is the very antithesis of a job. Not only that, but it simply is not within any normal understanding or expectations that employees would make a massive capital investment to obtain employment. In fact, with respect to at least one Owner-Operator, Solis, who did not testify as to his belief, the ALJ employed this contextual approach. She found that that Solis must have believed that he was an independent contractor because he owns two trucks and employs two second-seat drivers. ALJD p. 20.

Without question, the record does not support a finding that the charging parties believed they were employees, and much less that every single Owner-Operator contracted to XPO so believed. On this count, the decision stripped to its core is nothing more than an impermissible finding that the drivers are employees because they say they are employees. *Sisters Camelot*, 363 N.L.R.B. No. 13, slip op. at 4.

Whether Drivers Were Engaged in a Distinct Occupation or Business/ Whether Driver's Work Was a Part of Respondent's Regular Business.[11] Equally flawed is the weight given by the ALJ to the factor of whether the drivers' work was a part of the Respondent's regular business. The entire finding is explained with nothing more than the conclusory statements that "Respondent could not perform its function without the drivers" and that "there was no substantive distinction between its core business and the function of its drivers." The ALJ also stated that "to the casual observer, most likely, the driver and the truck are indistinguishable from the respondent." ALJD p. 17.

[11]The ALJ collapsed these two factors into one. *See, supra. at* 26.

The ALJ's statements are both incorrect and without substance. They are incorrect because there is a critical difference between XPO and the drivers. The Owner-Operators drive trucks which haul cargo from point to point. XPO owns no trucks, instead, it arranges for the shipment of the cargo which arrive in containers. Merely because companies performing separate functions in a long train of transportation are interdependent does not make one the employer of the other. XPO is no more the employer of the Owner-Operators who deliver the freight over the road than it is of the seamen who deliver that same freight over the sea.

The statements are truisms without substance. No business hires anyone for which they have no need. By definition, virtually any time a business contracts out work, the fact that a contractor performs work that is a regular and even essential part of a business is not determinative. The ALJ's statements validates the concern in *FedEx* that such cavalier treatment impermissibly would preclude companies from hiring delivery drivers. The "more compelling countervailing factors" here, such as the economic risk taken by the drivers and their complete control over their work renders this factor immaterial. *FedEx I*, 563 F.3d at 502.

The Length of Time the Drivers Were Employed. The ALJ's determination that the length of time factor fares no better, and is somewhat quixotic in light of her rulings in other areas that a few examples are insufficient. The ALJ takes the experience of only ten drivers that had provided services for XPO for many years. Yet she ignores record evidence that demonstrated this was their choice, such as the twenty drivers who ceased working for XPO rather than sign the ICOC.[12] Camacho 1161-62. The obvious mobility of the drivers is important here because it demonstrates, contrary to the ALJ's finding, that the short, 90 day term of the ICOC is meaningful, freeing up the Owner-Operators to work for any of XPO's over one

[12]The conclusion also improperly defines the length of time because it fails to recognize that a significant portion of this time was with a separate, predecessor company under a different agreement.

thousand competitors. Camacho 1172; Trauner 1962; GC Exh. 60 at Section 3; GC Exh. 57 at Section 10(A).

In this environment, and in the complete absence of contrary evidence, all that the length of time demonstrates is the pursuit of economic opportunity, *i.e.*, that the Owner-Operators who continue to work for XPO find it in their best interest to do so and those that do not move on. Where the length of time does not indicate that a contractor is beholden to the company, the length of time adds little to the analysis. *Cf. Lancaster Symphony Orchestra*, 357 N.L.R.B. 1761, 1766 (2011) (orchestra members returning for successive 1 year periods for up to 30 and 59 years not conclusive of employee status).

The Method of Compensation. As to the ALJ's determination on the method of compensation, the ALJ based her entire decision on the single ground that drivers could not negotiate compensation. That finding was contrary to the record. Some Owner-Operators even hired attorneys to assist them with negotiations. Camacho 1165-69, 1182-83

Not only do the drivers negotiate over compensation, the ICOCs expressly contemplate such negotiations. GC Exh. 60 at Schedule B at Section 2: "Changes In Fees." *See also* GC Exh. 57 (ICHA) at Exhibit C ("Carrier and you may also agree to spot pricing for a particular shipment that differs from the standard point-to-point or mileage basis"). On numerous occasions, XPO has had to negotiate with drivers in order to find a driver willing to take on a less desirable or urgent delivery, lest XPO lose out on the delivery to a competitor or suffer penalties. Also, as a result of concerns raised by the drivers, changes were made to the payment terms in the ICOCs. Camacho 1182-83. Just like the entrepreneurial opportunities discussed in *FedEx I*, that some of the drivers actually availed themselves of these opportunities to negotiate their

payment terms indicates that they were available to all, weighing in favor of independent contractor status.

In any event, the ALJ's approach is in error because it ignores the crux of the test, which looks at how contractors are compensated, and not how much. The method of compensation described by the ALJ in her opinion simply cannot support her finding. There is nothing in her findings that in any way resembles the payment structure in an employment relationship, save maybe the fact that payments are made weekly. But such regularity in payments, even weekly, are an insufficient basis for this factor to weigh in favor of employee status. *See also The Arizona Republic*, 349 N.L.R.B. at 1041, 1045 (weekly); *Dial-A-Mattress*, 326 N.L.R.B. at 887, 891-92 (bi-weekly); *see also* 49 CFR § 376.12(f) (requiring pay in intervals not to exceed "15 days after submission" of paperwork).

In sum, the ALJ's determination that the Owner-Operators are misclassified statutory employees runs completely contrary to the evidence presented at the hearing. It ignores the empirical evidence of the Owner-Operators opportunity for profit and loss, such as large income disparities or Avalos' experience in losing his truck, and the ALJ's own findings of the minimal control XPO exercises over their work. Indeed, the Owner-Operators level of control over their own work is such that it likely would preclude them from being protected under the Act even if classified as employees. *See Superior Bakery, Inc*. v. *NLRB*, 893 F.2d 493, 496 (2d Cir. 1990), *see also NLRB v. Bell Aerospace Co. Div. of Textron*, 416 U.S. 267, 289 (1974) (managerial employees are not covered by the Act).[13]

[13]This conclusion also exposes an error relating to the ALJ's order. To the extent that the order applies to all Owner-Operators it is overbroad. The record demonstrated that conditions among Owner-Operators varied greatly, yet the order is based on evidence relating to only a small sampling of Owner-Operators. For example, the record contains testimony of both Owner-Operators who owned multiple trucks and those with only one truck. With such disparate facts, including evidence that some drivers under no circumstances could be employees, an order applying to all Owner-Operators by definition lacks evidentiary support. *Menard Inc.*, 18-CA-181821, 2017 WL 5564295 (N.L.R.B. Div. of Judges Nov. 17, 2017).

B. The ALJ's Findings on the Substantive Unfair Labor Practice Charges Against XPO Also Are in Error

Once the proper status of drivers as independent contractors is recognized, no basis exists for the remaining allegations in the complaint because independent contractors are not covered by the Act. But even if the Owner-Operators are found to be employees, the record fails to establish any violations of the Act.

1. The ALJ Erred in Finding that the XPO Interrogated, Promised Benefits to, or Solicited Grievances from Humberto Canales

The ALJ found that XPO violated 8(a)(1) of the Act based on a brief March 5, 2015 conversation between then Owner-Operator Humberto Canales and XPO safety manager Enrique Flores. The ALJ found that Flores had unlawfully interrogated Canales about union activity, promised increased benefits to Canales by purportedly promising to inquire whether Canales's truck and insurance payments could be cancelled for weeks of work that Canales had missed, and solicited grievances by allegedly asking Canales what he would do to make XPO an "excellent company."

The ALJ's finding of a violation must fall because it is based entirely on the testimony of Canales, whom the ALJ found entirely lacking in credibility.

> Last, I do not find that Canales overall is a credible witness; . . . Often he responded to questions on cross examination with evasive, contradictory, and confusing answers. . . . Canales gave several nonsensical responses denying he could get bonuses or set his own work schedule until finally admitting to both. (Tr. 952–956.) He also provided convoluted answers in an attempt to deny what he previously admitted to in his affidavit . . . . Frequently, Canales provided what I perceived as deliberate nonresponsive answers to questions posed by the counsel for the Respondent. On direct examination, he tailored many of his answers to conform to the responses he felt would best help the General Counsel's attorney, rather than to illuminate the truth. Based on the evasive, confusing, and contradictory responses Canales gave on cross-examination, his overall demeanor, and the totality of the evidence, I find he was not a credible witness.

ALJD p. 40-41.

Despite this scathing assessment of Canales' credibility, the ALJ decided that because he was able to state a date, time and location for the meeting, a charge based solely on his testimony suddenly had a "ring of truth." ALJD p. 35. Whatever the merits of such a credibility determination in any other context, it cannot stand as the sole evidence of a violation of the Act where the witness has been so thoroughly impeached. Even if Canales actually remembered the date, it is probative of nothing but his memory and in no way rehabilitates a lack of credibility.

Even if one could put aside the clear problems with Canales's credibility, his account does not establish a violation of the Act. The brief conversation between Canales and Flores, who shared an acknowledged friendly relationship cannot plausibly have necessary element of coercion or interference. *Sunnyvale Med. Clinic*, 277 N.L.R.B. 1217, 1218 (1985); *see also Rossmore House*, 269 N.L.R.B. 1176, 1177 (1984). Nor can the question "what would you change to make an excellent company" constitute a solicitation of grievances. An employer has a right to run its business, which is why the mere "solicitation of grievances is not in and of itself an unfair labor practice." *Hedstrom Co. v. NLRB*, 558 F.2d 1137, 1142 n.12 (3d Cir. 1977)). "To listen to suggestions does not in and of itself imply that the suggestion will be acted on . . . ." *Visador Co.*, 245 N.L.R.B. No. 71, slip op. at 3 (Sept. 27, 1979)).

Finally, agreeing to send an e-mail as requested by Canales to determine if Canales's truck and insurance payments *for time when Canales was not working* could be cancelled a "promise" is absurd on its face. Other than the conclusion, the ALJ never explains how this simple commercial request somehow converted to an unlawful promise. Anyway, the mere fact that Canales's testimony is that Flores agreed to ask, not deliver, makes it apparent that no benefit was promised.

2. The ALJ Erred in Finding that XPO Discriminated Against Domingo Avalos by Not Giving Him a $20,000+ Loan

The ALJ found that XPO violated Section 8(a)(3) by denying a truck repair loan of over $20,000 to Owner-Operator Domingo Avalos to cover the costs of an engine repair attributable to Avalos's negligent failure to maintain his truck. No dispute exists that the loan was discretionary and that Avalos was not entitled to the loan. *See, e.g.*, Decoud 1596. The ALJ concluded the violation existed because XPO's exercise of discretion was driven by anti-union animus.

The fatal flaw in the ALJ's conclusion is that she already had found that XPO entertained no such animus. In rejecting another charge that XPO unlawfully suspended Avalos in retaliation for his union activity, the ALJ found that there was "no direct or circumstantial evidence proving that Respondent harbored animus against Avalos because of his protected conduct." ALJD p. 31.

The ALJ relies on e-mails Camacho sent to upper management referencing Avalos's union activity to conclude that unlawful animus tainted this one decision. The problem with that analysis is that those e-mails were sent *after* XPO had initially denied the loan, a denial that occurred at a time when Banuelos, and not Camacho who had not yet assumed the general manager position, was handling the loan request. Thus, no record evidence exists to support any finding that the initial decision to deny the loan was motivated by antiunion animus.

Camacho's subsequently did try to have management to reconsider Avalos's loan request. But it simply is error to infer that the very person who renewed Avalos's request was the person who sought to deny him the loan. *Steel-Tex Mfg. Corp.*, 206 NLRB 461, 463 (1973). Nor can the article about the union in which Avalos was featured affect that analysis because Avalos already was a known union adherent, *see* ALJD p. 41, the article changed nothing.

A far more obvious reason for the reaffirmation of the loan denial exists – the company asked Avalos to contribute a small amount of his own funds to the repair, which he refused to do. Avalos 477-78; Camacho 1104-05. In this context, even if the e-mails evidenced anti-union animus, they still do not support the necessary finding of improper anti-union motivation, *i.e.*, that the loan would have been made but-for the unlawful animus. *Wright Line*, 251 N.L.R.B. at 1089. The evidence shows that to consider changing its prior, lawful denial of the loan, XPO insisted on an additional condition. Avalos's failure to meet that condition is a legitimate, non-discriminatory basis for denying the loan.

In any event, what is completely lacking from the record is evidence of any discrimination against Avalos. While the record contains extensive discussion of loans that had been made to other drivers, and disputes regarding whether a $16,000 loan made by Pacer is probative of XPO's conduct, it contains nothing regarding their similarity to the conditions pursuant to which those loans had been made. The critical facts here is that Avalos not only deliberately ignored a problem, he did so specifically because he intended make XPO his financial partner through a loan. And when he was asked to contribute to the solution, he refused, insisting that XPO bear all of the risk. It simply is completely lawful, and in fact rational, for a company to refuse to provide a loan to a person under these circumstances.

V. CONCLUSION

For the foregoing reasons, the Owner-Operators are properly classified as independent contractors and are not within the protections of the Act. Accordingly, the ALJ's Decision finding the Owner-Operators to be employees should be reversed and the complaint dismissed. Further, even assuming arguendo that the Owner-Operators are subject to the Act, the ALJ's findings that XPO committed specific unfair labor practices are also in error and should be reversed and the complaint dismissed in its entirety.

Respectfully Submitted,

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Dated: November 13, 2018

CERTIFICATE OF SERVICE

I hereby certify this 13th day of November, 2018, that a copy of the Respondent XPO Cartage's Exceptions to Administrative Law Judge Christine E. Dibble's Decision and the Brief in Support of Respondent XPO Cartage's Exceptions to Administrative Law Judge Christine E. Dibble's Decision were electronically served on the Region through the Board's electronic filing system, and also served on the following by email:

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